No. 03-3218

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PRAIRIE BAND POTAWATOMI NATION, Plaintiff/Appellant, v. STEPHEN S. RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, in his official capacity, Defendant/Appellee.	

On Appeal from the United States District Court
For the District of Kansas

The Honorable Julie A. Robinson
District Judge

Case No. 99-4071-JAR

APPELLANT'S REPLY BRIEF

Respectfully submitted,
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Tribal Attorney
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STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

SUMMARY OF THE ARGUMENT

The Nation's fuel marketing activity forms an integral part of its general on-reservation economic enterprise and embodies substantial reservation value in which the Nation has a significant interest. The Nation's evidence of this remains uncontroverted by the Secretary. This substantial reservation value and the Nation's governmental interest in it exist for both Indian and non-Indian commerce at the Nation Station. The state tax burdens and impairs this reservation value and the Nation's tribal government activities. Under the law as correctly applied, the state tax fails both the balancing test and the infringement test. It is also preempted by the Indian Trader Statutes and the Kansas Act for Admission.

STANDARD OF REVIEW

The standard of review is clearly *de novo* for all issues on appeal from a grant of summary judgment. The Secretary argues, contrary to this rule, that an abuse of discretion standard may apply, citing *Woerner v. U.S. Small Business Administration*, 934 F.2d 1277, 1279 (D.C. Cir. 1991). Unlike *Woerner*, the current appeal is from a decision that pertains solely to the underlying merits of the case. The district court's order is premised on the lack of factual issues, and this current appeal involves solely questions of law. Therefore, complete *de novo* review is appropriate. *See Mitchell v. City of Moore, Oklahoma*, 218 F.3d

1190, 1198 (10th Cir. 2000) (holding that appellate courts "review application of legal principles de novo" for appeals from the denial of permanent injunctions); *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (holding that the appellate courts "engage in 'essentially *de novo* review' when the district court's decision hinges on a question of law"); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1215 n.5 (2nd Cir. 1972) (holding that in a declaratory judgment action to determine the copyright interests in a popular song, the court of appeals is not bound by the "clearly erroneous" standard).

ARGUMENT

I. THE KANSAS FUEL TAX AT ISSUE IS INVALID AS APPLIED TO THE NATION'S FUEL BECAUSE THE FEDERAL AND TRIBAL INTERESTS AGAINST STATE TAXATION OUTWEIGH THE STATE INTERESTS IN FAVOR OF STATE TAXATION.

A. The Balancing Test Should Be Applied.

Contrary to the Secretary's contention, the balancing test governs the resolution of this case. The Secretary argues that the balancing test should be abandoned in favor of preemption only by express federal statute. This argument is contrary to the law of this Court and is inconsistent with the reasonable federal protection of tribal governments.

In *Sac and Fox*, this Court held that for the Kansas fuel tax the balancing test must be applied to "adequately balance the federal, tribal, and state interests *as Supreme Court authority at this point requires*." *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 585 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001) (emphasis added). In a similar case of the attempted enforcement of a state law off-reservation, *Prairie Band*, this Court held that an express federal statute is not required for federal preemption. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) ("'in order to find a particular state law to have been preempted by operation of federal law, [there need not be] an express congressional statement to that effect.'").

The balancing test is appropriate even though the legal incidence of the tax is imposed on the Nation's non-Indian distributor and is triggered by the distributor's receipt of fuel outside the reservation. The Secretary attempts to avoid the balancing test on the basis that it is an off-reservation tax on a non-Indian, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). *Mescalero* is not even on point because it pertains to state taxes that burden Indian activity off-reservation, not state taxes on a non-Indian off-reservation that burden a Tribe and its activity on-reservation. Moreover, as this Court has recognized, "the Supreme Court has not restricted the balancing-of-interests test

to cases in which the tribal activity is solely on-reservation." *Prairie Band*, 253 F.3d at 1255.

B. In Applying the Balancing Test, the District Court Failed to Properly Consider and Weigh the Competing Federal, Tribal, and State Interests.

1. Contrary to the District Court's Conclusion, the Kansas Tax Burdens a Tribal Enterprise that Embodies Significant Reservation Value.

The Secretary's brief utterly fails to acknowledge, must less address, the Nation's argument that the district court erred in concluding that the Nation Station enterprise has no reservation value. Instead, the Secretary simply reiterates the legal errors committed by the district court. He fails to refute or even address the Nation's investment, control over, involvement in, and creation of the Nation Station and the market through which customers are drawn to the casino enterprise and the Nation Station.

The Secretary also completely ignores the distinctions drawn in the Nation's opening brief between *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and other cases in which the tribe made no showing of reservation value and the present case in which the Nation made a strong showing of reservation value. Indeed, as the Nation discussed in its opening brief, *Colville* confirmed that the "efforts of the Tribes in importing and marketing" cigarettes and the "location" of Indian reservations

where the cigarettes sales occur are relevant to determining the reservation value embodied in cigarette marketing enterprises. 447 U.S. at 158. Similarly, *Sac and Fox* was remanded to the district court for examination of "whether and to what extent the motor fuel tax would burden commerce derived from value generated on Indian lands," 213 F.3d at 585, a directive which assumed that tribal marketing efforts and enterprise location, among other factors, would be relevant to the reservation value inquiry.

In addition, the Secretary ignores the directive in cases such as *Indian Country USA* and *Cabazon*, which establish that one must look at the entire tribal economic enterprise, not simply the origin of the products sold or used in the enterprise, and must assess the extent of tribal participation and control in such enterprise in order to determine the extent of the reservation value. *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 972, 982-84, 986 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987). When the correct test enunciated in *Colville*, *Indian Country USA* and the other cases is applied, the Nation clearly has established that the state tax burdens reservation value.

The Secretary's two-sentence response to all of this is simply that "those cases turned largely on the fact that...the State was attempting to impose tax or regulate on reservation activities. The State tax at issue here is imposed off-

reservation against non-tribal members." (Appellee's Brief, p. 31) But this is not the correct legal standard. As the Secretary himself concedes, the correct legal standard is that "State taxes generally may not be imposed on non-Indians where revenues burdened by the tax are derived from 'value generated on reservations by activities in which [Indians] have a significant interest.' *Colville*, 447 U.S. 134, 156-57 (1980).'" (Appellee's Brief, p. 48.) Therefore, regardless of where the tax is technically imposed, all of these cases turn on whether the state tax on the non-Indian burdens reservation value of the Tribe. That is exactly what is occurring in the current case.

The Secretary's and the district court's principal error in this case is to misapply the ruling in *Colville* and ignore the Nation's ample evidence of reservation value. They improperly leap to conclude that the *Colville* Court held as a matter of law that reservation value cannot be generated if a tribe imports goods to a reservation and resells them to non-Indians.

> Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.

Memorandum Opinion, Opening Brief, Ex. A, p. 23, A(V) 67. The district court concluded, and the Secretary contends, that the Nation is not generating

value simply because it doesn't manufacture the fuel it sells. By this same misguided reasoning, no value is generated by a grocery store or a retail shopping center.

Value is generated in far more activities than manufacturing, as the *Colville* court was well aware. 447 U.S. at 158 (marketing efforts and location are relevant to reservation value). For all businesses, value activities include primary activities (inbound logistics, operations, outbound logistics, marketing and sales, and service) and support activities (procurement, technology development, human resource management and firm infrastructure). *Competitive Advantage: Creating and Sustaining Superior Performance*, Porter, Michael E., Macmillan, Inc, 1985, p. 39-43. The Nation has generated reservation value for the Nation Station through many of these value activities:

> Inbound and Outbound Logistics. The Nation operates its $1.5 million convenience store and its $250,000 of tank storage and fuel handling and monitoring systems, receiving, storing and delivering fuel and other merchandise to its customers. (Fact 3(B) and (C))[1]
>
> Operations and Procurement. The Nation directly manages the operations of the Nation Station, which include the sale of fuel, prepared food and other convenience store merchandise and the procurement of supplies and equipment for its operations. (Fact 3(C) and (E))

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[1] Citations to "Facts" are to the numbered facts in the Statement of Facts in the Nation's opening brief.

> Marketing and Sales. The Nation constructed and operates a $35 million casino next to the Nation Station. The Nation has developed the casino as a tribal resource and generated the traffic necessary for the Nation Station to market its products in an otherwise remote rural location. (Fact 3(E))
>
> Human Resource Management and Firm Infrastructure. The Nation provides all of the Nation Station's personnel, accounting, financing and management. (Fact 3(C)) Over half of the Nation Station's employees are tribal members. (Fact 3(D)) The Nation financed and constructed the Nation Station. (Fact 3(B))

The district court's conclusion that the Nation has generated no reservation value is simply not supported by the evidence of this case.

The Secretary cites *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). Like the other Ninth Circuit cases cited by the district court, *Yavapai* is factually off point. Contrary to the misinformation in the Secretary's brief (p. 49), the Tribe in *Yavapai* was not involved in any meaningful way in the food sales or any other aspect of the reservation enterprise at issue in the case. "All the sales are by non-Indians to non-Indians. There is no tribal employment. There is no active tribal participation in the business." 117 F.3d at 1117.

The Secretary repeatedly argues that the state fuel tax is directed at "off-reservation value." There is absolutely no evidence of this alleged off-reservation value. The Secretary does not even bother to describe what it might be. The fact is that the state tax is generally directed at on-reservation value.

Prior to the late 1990's, the Kansas fuel tax was imposed upon the fuel retailer. Accordingly, the State was clearly prohibited from imposing its fuel tax on tribal reservation retailers. Kan.Atty.Gen.Op. 89-115, 1989 WL 45556 (Kan.A.G.) ("since states generally cannot tax Indian tribes or their property absent cession of jurisdiction or other federal statutes permitting it, the State of Kansas may not impose or collect motor-fuel taxes on or from Indians on federally recognized Indian reservations.") Although the technical incidence of the state fuel tax was later amended to fall upon fuel distributors off-reservation, the state tax is still directed at the activity where the fuel is used, which is generally where it is sold at retail. "Motor fuel taxes are user fees which are designed to collect revenues to build and maintain roads and are generally reserved for these government functions." (A(II) 84; *see also* K.S.A. §§ 79-3402; 79-3425, 79-3425c, and 79-34,142, which distribute over 40% of the motor fuel tax revenue to local governments) Fuel taxes are generally intended to maintain the roads where the fuel is sold at retail and used, which in this case is the reservation. *Sac and Fox*, 213 F.3d at 585 n.15.

The best indication that the state fuel tax is directed at activity where the fuel is delivered at retail and used is the complete exemption for fuel distributed out-of-state and for fuel resold to another distributor. K.S.A. § 79-3408(d)(1) and (5); *see also* K.S.A. § 79-3408(a) ("A tax...is hereby imposed on the use,

sale or delivery..."). If the state tax were directed at values or activity occurring *prior* to delivery to the retailer, there would be no reason to exempt fuel delivered out-of-state or to another distributor. Delivery of fuel to the local retailer in Kansas is clearly the key event without which there would be no state tax.

As for any value associated with a fuel wholesaler's use of off-reservation roads prior to or after retail delivery, the state is already being compensated through state fuel taxes imposed on the fuel that the distributor personally consumes. *Ramah Navajo School Board, Inc. v Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 n.9 (1982) ("Presumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.") As for value associated with the Nation Station and its customers on reservation, the Nation is clearly providing the majority of government services to them. (Facts 11-17) As for the values associated with road use by the Nation Station's customers, no doubt some of its customers consume some of the fuel off-reservation. (This aspect is clearly not disproportional because customers are not being drawn to the Nation Station to buy cheap fuel. (Fact 4)) Offsetting this is the fact that many casino patrons and others who use reservation roads buy no fuel at the Nation Station and pay no tribal fuel taxes. These consumers

purchase fuel somewhere off-reservation, at their place of residence or at one of the two non-member gas stations on the reservation. Neither the State nor the Nation seeks to impose and apportion the fuel tax based upon the location of actual road use by these fuel consumers. The location of the retailer is the key, which in this case is on the reservation.

The current case is very similar to *Prairie Band*. Both cases have significant on-reservation aspects involving a tribal government: the tribal vehicle regulation in *Prairie Band* and the tribal operation and taxation of a reservation business here. Both cases involve off-reservation state action that interferes with on-reservation, traditional tribal government functions. In *Prairie Band* dual state and tribal vehicle registration was impossible. *Prairie Band v. Wagnon*, 276 F. Supp. 2d 1168, 1194 (D.C. Kan. 2003) ("Tribal registration and titling is an all-or-nothing proposition.") In the current case, state and tribal fuel taxation are mutually exclusive. (Fact 10)

The Nation Station is "the Indian enterprise at the heart of this dispute" and it "is located on, not off, the reservation." *People v. McCovey,* 36 Cal.3d 517, 205 Cal.Rptr. 643, 685 P.2d 687, 697 (1984) (en banc) (distinguishing *Mescalero* in part because "the Indian activity...occurred entirely off the reservation, while this case involves on-reservation fishing followed by an off-reservation sale," cited with approval in *Prairie Band*, 253 F.3d at 1256.

Also, unlike *Mescalero*, because the state fuel tax in the current case burdens tribal government functions on-reservation, "the interests of the tribe are heightened, a significant counter to the state's interests in the effects of off-reservation driving." 253 F.3d at 1256.

The fact that the state tax is technically imposed off-reservation on a non-Indian is not controlling. The state tax is directed at and burdens reservation value. Under the correct *Colville* standard, the state tax illegally burdens revenues derived from value generated on reservation by activities in which the Nation has a significant interest. It would destroy the Nation Station's business and make collection of the tribal fuel tax impossible. Because the Secretary has presented no evidence to rebut the Nation's demonstration of substantial reservation value in which the Nation has a significant interest and the burdens of the state tax on that value and the Nation's government, the Nation must prevail in the balancing of interests.

2. The District Court Failed to Accord Proper Weight to the Nation's Compelling Interest in Raising Revenues to Construct and Maintain Reservation Roads, Bridges, and Related Infrastructure.

The Secretary also fails to address the district court's failure even to recognize, much less accord proper weight to, the Nation's compelling interest in raising revenues through its fuel tax to fund tribal government services

provided to the Nation Station, its customers and its fuel distributor. (Facts 1, 5, 6, 11-15) Having created a significant motor traffic and fuel market on its reservation, the Nation has a compelling interest in levying its own tribal fuel tax upon the resulting fuel sales in order to carry out its responsibilities to build, repair and maintain its reservation roads and bridges.[2]

Instead, the Secretary persists in citing irrelevant and distinguishable cases and ignores the distinctions presented by the Nation in its opening brief. The Secretary argues under *Sac and Fox* that the state tax can only be invalidated to the extent that fuel is purchased by consumers who are tribal members. The Secretary also argues that the State has a strong interest and the Nation has no interest in the Nation Station's fuel sales merely because many of its customers are non-Indians. These arguments do not withstand inspection.

Sac and Fox held, citing *Colville*, that the tribes appeared to be marketing a state tax exemption and that the state tax burden fell upon the consumers who were avoiding the tax. 213 F.3d at 584-85, n.14. The facts of the current case are fundamentally different from those in *Colville* and *Sac and Fox*. The Nation Station embodies reservation value generated by the Nation without

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[2] The tribal fuel tax and the tribal road services being performed are clearly reasonable in comparison to those provided by the State. A(II) 88-89.

respect to any state tax exemption (Facts 3 and 4) and the state tax is burdening that value and the Nation's tribal government (Facts 5-10).

The Nation's interests are particularly strong – and the State interest is weak – because the state tax burdens on-reservation commerce with an Indian Tribe.

> The State also has a general interest in taxing its residents, for whom it provides services. Nevertheless, this interest is substantially diminished when the residents engage in activities largely beyond the state's jurisdiction and control, unless the activity or circumstances somehow undermine the state's ability to protect its economy and tax base.

Indian Country, 829 F.2d at 987. In fact, the Nation's substantial expenditures on reservation roads, financed by tribal fuel taxes, actually preserve the State's tax base by assuming governmental responsibilities that the County and State would otherwise bear. (Facts 12 and 13) The Nation has the same needs as other jurisdictions to collect its own fuel tax to pay for tribal governmental services to build and maintain reservation roads. The Nation is similarly situated to Kansas' sister states and their local governments. *Salt River Pima-Maricopa Indian Community v. Yavapai County*, 50 F.3d 739, 740 (9th Cir. 1995) ("We conclude that the Community is similarly situated with Arizona's sister states and their cities and counties.")

The relevant tribal interest here is not merely economic, it is the federally-protected interest in tribal government. When a citizen travels to another jurisdiction, he is usually subject to its laws. The same is true for non-Indians who travel to an Indian reservation. Non-Indian consensual commerce with a Tribe gives rise to a clear tribal interest and right to regulate and tax such commerce.

> Tribes retain sovereign authority to regulate economic activity within their own territory, *see, e.g., Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (recognizing "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction..."); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 152-53, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (observing that tribes possess broad civil jurisdiction over the activities of nonmembers on reservation land in which the tribes have a significant interest, and that there was no evidence that Congress had departed from that view).

N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1192-93 (10th Cir. 2002) and see opening brief, p. 54-55. "The power to tax members and non-Indians alike is an essential attribute of [tribal] self government." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985). All of this refutes the Secretary's argument that the Nation has no tribal interest in its tribal fuel tax revenues or providing tribal government services merely because many of the Nation Station's customers are non-Indians.

The Secretary argues that the burden of state taxes on Indian tribal transactions does not violate federal law, citing *Thomas v. Gay*, 169 U.S. 264 (1898), and *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 970 (10th Cir. 1994). His argument is inconsistent with his own admission that under *Colville*, "State taxes generally may not be imposed on non-Indians where revenues burdened by the tax are derived from 'value generated on reservations by activities in which [Indians] have a significant interest." (Appellee's Brief, p. 48.) The cases he cites, too, are inapposite.

In *Thomas*, the Supreme Court upheld a state property tax imposed on cattle owned by non-Indian lessees of tribal land. Unlike the current case, the Indian tribe in *Thomas* did not participate in generating the reservation value of the business in question and there was no evidence that the tax burdened tribal government, a tribal tax or the Tribe's ability to provide government services to the lessee or otherwise. 169 U.S. at 273. The Indian tribe did not own the cattle and had no involvement in the cattle grazing operation. The Tribe had only a beneficial interest in the leased land and the passive receipt of rents from it. In contrast, the Nation created, financed, constructed, owns and operates the reservation business, thereby generating significant reservation value, and its business and its government are both burdened by the tax.

The Secretary cites this Court's decision in *Chickasaw,* which the U.S. Supreme Court reversed, holding that "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, see *Washington v. Confederated Tribes of Colville Reservation.*" *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (emphasis added). *Chickasaw* in fact confirms the Nation's contention that under *Colville* the balancing test is applied when the tax is imposed on a non-Indian doing business with an Indian tribe.

The quote cited by the Secretary from this Court's decision in *Chickasaw* was made only to point out that the location of the economic burden of the tax does not control the question of its legal incidence. 31 F.3d at 970 ("Even if it were true that the economic burden of the tax falls on the Tribe..., this would not be determinative of the question of the legal incidence of the tax.") *Chickasaw* is off point for other reasons. The "interference-with-self-governance plea was neither made in the lower courts nor presented" on appeal. 515 U.S. at 465. The state beer tax was also expressly "authorized as part of the regulatory authority granted by Congress" under 18 U.S.C. §1161. 31 F.3d at 970. The Secretary's reliance is also misplaced on *Montana Catholic Missions v. Missoula County*, 200 U.S 118 (1906), which only held that the mere,

voluntary expenditure of income from non-Indian property for charitable Indian work was insufficient to exempt the property from state taxation.

3. The District Court Totally Overlooked the Federal Interests Against State Taxation.

a. The Federal Indian Trader Statutes By Themselves Preempt the State Tax.

As the Supreme Court held in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), and *Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160 (1980), the Indian Trader Statutes bar the imposition of the tax on the Nation's non-Indian distributor.[3] While the Nation recognizes that this Court in *Sac and Fox* apparently held to the contrary notwithstanding these Supreme Court authorities, the *en banc* Court clearly is authorized by Fed. R. App. P. 35(a) to revisit its holding in *Sac and Fox* on this point. 213 F.3d at 580-83. The Secretary utterly fails to address the merits of this issue.

b. Other Strong Federal Interests Weigh Against State Taxation.

The Secretary misrepresents the Nation's argument by suggesting that the Nation believes that the general federal statutes it has relied on independently preempt the tax. Rather, the Nation argues that these federal statutes embody

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[3] The Nation clearly argued the Indian Trader Statutes issue in the district court in discussing all of the federal interests which prevent state taxation in this case. (A(V) 83)

consistent and strong federal interests in tribal economic development, self-sufficiency, and self-government. The federal interests, coupled with the strong tribal interests in this case, clearly tilt the balance against imposing the state tax, especially when the evidence is viewed favorably to the Nation, the non-moving party below.

4. The District Court Misconstrued and Exaggerated the State Interest By Erroneously Focusing on Unspecified Off-Reservation State Services Provided to the Nation's Customers.

The Secretary completely ignores the Nation's argument regarding the nature and scope of the state interest that is to be considered under the balancing test. As the Nation pointed out in its opening brief (pp. 46-52), the district court focused exclusively on the wrong recipient of state services and the wrong location of state services, and it did so without inquiring into the particular nature or quantum of the services, without considering whether or how such services relate to the on-reservation activity burdened by the tax, and without relying on a scrap of evidence properly before the court. At the same time, the district court entirely ignored the substantial tribal services being provided. The Secretary erroneously focuses on the mere fact that the tax is technically triggered under the state statute by an event that occurs outside the reservation and on the state's general interest in raising revenue, without a

particularized discussion of the state's interest in imposing the tax in the precise circumstances of this case. Because the Secretary has not demonstrated state interests in imposing the state tax which outweigh the substantial tribal and federal interests, the district court should be reversed.

B. When the District Court's Errors Are Eliminated, the Balance of Federal, Tribal, and State Interests Tips Decisively Against State Taxation.

In his brief, the Secretary weighs the federal and tribal interests in the balance one stone at a time, arguing that no one of them outweighs the alleged state interests. The Secretary misses the point. The state tax is burdening reservation value in which there are many substantial tribal and federal interests, and the state interests, when properly analyzed, do not outweigh them.

II. THE KANSAS MOTOR FUEL TAX AT ISSUE IS INVALID AS A MATTER OF FEDERAL LAW BECAUSE IT IMPERMISSIBLY INFRINGES ON THE NATION'S RIGHTS OF TRIBAL SELF-GOVERNMENT.

A. The State Tax Fails the Infringement Test.

The Secretary has conceded that the Nation has the governmental right to impose tribal fuel taxes at the Nation Station to fund its government. (Fact 7) This right includes the right to tribally tax consensual commerce with both Indians and non-Indians, as discussed above. It is uncontroverted that this right

is impaired. (Fact 10) Based upon the erroneous conclusion that the Nation has not generated reservation value, the district court improperly refused to recognize or find infringement of the Nation's interest in the Nation Station as an important source of tribal fuel taxes to fund its government. This constitutes an independent ground for reversal.

B. The State Tax Violates the Kansas Act for Admission by Impairing the Nation's Rights.

The first phrase of the Kansas Act for Admission, Section 1[4], applies without regard to any treaty requiring consensual inclusion in state territory. The grammar of Section 1 is disjunctive, with the first phrase preventing the impairment of Indian rights:

> "And the said state shall consist of all the territory included within the following boundaries, to wit: [legal description]: Provided,
>
> > That nothing contained in the said constitution respecting the boundary of said State shall be construed
> >
> > > [1] to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, [the "first phrase"] or
> > >
> > > [2] to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; * * *, [the "second phrase"] or

[4] 12 Stat. 127, ch. 20, §1; Jan. 29, 1861.

> [3] to affect the authority of the government of the United States to make any regulation respecting such Indians..."

Sac and Fox discussed Section 1, but it only construed the second phrase of this federal law.[5] Unlike *Sac and Fox*, the issue here is simply whether the 1861 boundary of the state is operating in a way that impairs the Nation's rights.

The state tax is clearly impairing the Nation's governmental right to tax a tribal business on its reservation to fund its government operations. (Fact 10) But for the inclusion of the Nation's reservation within state territory, the fuel in question would be eligible for the state exemption afforded for all non-resident jurisdictions that receive fuel. K.S.A. § 79-3408(d)(1). Therefore, the fact that the Nation's reservation has been included within Kansas territory has caused the impairment of its tribal rights, contrary to Section 1.

> Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired...
>
> She accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians [as Kansas residents] cannot affect their situation, which can only be changed by treaty stipulation, or voluntary abandonment of their tribal organization.

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[5] The reference to Section 1 in *Sac and Fox* actually deleted the first phrase. 213 F.3d at 576.

The Kansas Indians, 72 U.S. (5 Wall) 737, 756, 757 (1866). In other words, tribal rights cannot be impaired merely as a result of the Tribe being included within the state's boundaries.

Although the Kansas Supreme Court reviewed the first phrase of Section 1 in 1998 and upheld the denial of the state fuel tax exemption for reservation deliveries, there was no tribal governmental interest involved or impaired in that case.

> "Under the circumstances, there has been no showing by Retailers that payment of fuel tax to Kansas interferes with the self-government of a Kansas tribe of a Kansas tribal member or the tax impairs a specific right granted or reserved by federal law to the Kansas Indians.
>
> * * *
>
> Retailers have no protected interest that is threatened by the State." *Kaul v. State Dept of Revenue*, 266 Kan 464, 477-478, 970 P.2d 60, 69 (1998), cert. denied 528 U.S. 812 (1999).

Unlike *Kaul*, the fuel tax in the current case impairs tribal government rights.

The Secretary argues incorrectly that the Nation's interpretation of Section 1 would create a tax-free haven. Like the district court, he seems oblivious to the obvious imposition of the substantial tribal fuel tax and he ignores the interference with the Nation's tax system of funding government operations with tribal taxes imposed on its reservation business. The Secretary does not even discuss the tribal tax in considering the balancing of interests.

The Secretary argues that the Act for Admission only means that the boundaries of the State "could not lessen the geographic dimensions of Indian reservations then existing." (Appellee's Brief, p. 19) This construction is contrary to the authorities cited in the Nation's opening brief, which the Secretary does not even mention. The Secretary's interpretation is also contrary to the Nation's reasonable reading of the first phrase and is unsupported by the case that he cites. The *Ward* decision did not concern the first phrase. It simply held that the state had criminal jurisdiction because the Kansas Indian reservation was included in Kansas territory and that, under the second phrase, the Tribe had no treaty requiring their consent to inclusion. *United States v. Ward*, 28 F.Cas. 397, 1 Woolw. 17 (1863).

The Secretary argues that "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." (Appellee Brief, p. 20) He cites *Organized Village of Kake v. Eagan*, 369 U.S. 60 (1962). It is clear that this interpretation should be rejected. If enabling acts were only proprietary, there would have been no need for P.L. 280 to enable states to "disregard enabling acts which limit their authority over such Indians." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 177 (1973) (also distinguishing *Kake* from cases involving reservations, 411 U.S. at 167-168).

Kake "did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians" 411 U.S. at 176.[6]

[6] *See also* David E. Wilkins, *Tribal-State Affairs: American States as "Disclaiming" Sovereigns*, Chapt. 1, from *The Tribes and the States: Geographies of Intergovernmental Interaction*, Brad A. Bays and Erin Hogan Fouberg (Rowman & Littlefield Publishers, Inc. 2002), A(V) 203, and A(V)188 (disclaimers "are congressional insulation against state jurisdiction over reservation Indians").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision granting summary judgment to the Secretary and order that the district court enter judgment for the Nation. Alternatively, the Court should remand the case to the district court to conduct the required particularized inquiry regarding the nature and weight of the tribal, federal, and state interests at stake and whether imposition of the Kansas fuel tax impermissibly infringes on the Nation's right of tribal government.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Nation's counsel hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. Rule 32(a)(7)(B)(ii). According to the Nation's word-processing system, this brief contains 5,581 words, exclusive of the table of contents, table of citations and certificates of counsel.

David Prager, III

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Appellant's Reply Brief were mailed on November 10, 2003, to:

John Michael Hale, Kansas Department of Revenue, 2nd Floor, 915 S.W. Harrison, Topeka, KS 66612-1588,

which is the last known address, by way of United States mail or courier.

I also certify that on November 10, 2003, an original and seven copies of the Appellant's Reply Brief were mailed to:

Patrick Fischer, Clerk, U.S. 10th Circuit Court of Appeals, Byron White U.S. Courthouse, 1823 Stout Street, Denver CO 80257

by way of U.S. First Class Mail or other class of U.S. mail that is at least as expeditious.

11-10-03
Date

David Prager, III